

Nov 14, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSHUA C. BUTLER, an individual,

Plaintiff,

v.

G4S SECURE SOLUTIONS (USA),
INC.,

Defendant.

NO: 2:19-CV-194-RMP

ORDER RESOLVING
DEFENDANT'S MOTION TO
DISMISS AND PLAINTIFF'S
MOTION TO STRIKE

BEFORE THE COURT is Defendant G4S's Motion to Dismiss for Failure to State a Claim, ECF No. 12. In his Response to Defendant's Motion, at ECF No. 23, Plaintiff Joshua Butler made a Motion to Strike pursuant to Federal Rule of Civil Procedure 12(f), which the Court now addresses. The Court has considered the record, the briefing, the relevant legal precedent, and is fully informed.

BACKGROUND

Plaintiff Joshua Butler began working for Defendant G4S Secure Solutions ("G4S") in February of 2015 as a security officer. ECF No. 1 at 2. G4S contracts with businesses to provide security services. *See id.* While a G4S employee, Mr.

1 Butler worked at McCain Foods USA, Inc. (“McCain”), a company that contracted
2 with G4S. *Id.* Until about August of 2016, Mr. Butler’s site supervisor at McCain
3 was Josh Charmley, a G4S employee. *Id.* at 3. However, when Mr. Charmley was
4 absent, Mr. Butler would be required to interact directly with G4S’s area
5 supervisor, Richard Harden. *See id.* at 2–3. From about June 2016 through July
6 2017, Mr. Butler frequently worked 60 hours or more per week at McCain because
7 of a G4S employee shortage. *Id.* at 3.

8 In spring of 2016, when Mr. Charmley was on vacation, Mr. Butler worked
9 directly with Mr. Harden. *Id.* When they first met in person, Mr. Harden referred
10 to Mr. Butler as “boy” several times. *Id.* Mr. Butler is an African American man,
11 and Mr. Harden is Caucasian. *Id.* at 2–3. Additionally, during Mr. Charmley’s
12 absence that spring, Mr. Butler was responsible for creating a schedule for the
13 McCain G4S security employees. *Id.* at 3. After Mr. Butler created the schedule,
14 Mr. Harden saw it and told Mr. Butler, “I didn’t think you people were even
15 capable of putting together something like that. You coons impress me every day.”
16 *Id.* Mr. Butler reported these comments to Mr. Charmley when he returned from
17 vacation. *Id.*

18 Later that year, when Mr. Charmley was absent on medical leave, Mr.
19 Harden mumbled in Mr. Butler’s presence that Mr. Butler was “creating too much
20 work for him,” and said something like, “Fuck, man, you nigger.” *Id.* Again, Mr.
21 Butler reported this comment to Mr. Charmley. *Id.*

1 In August of 2016, Mr. Charmley prepared to leave his position at G4S, and
2 the company offered the position to Mr. Butler. *Id.* Mr. Harden stated to another
3 G4S employee that he did not like Mr. Butler's "kind" and that he did not believe
4 he was "fit for the position." *Id.* at 4. He then told the employee that he believed
5 Mr. Butler was not a good fit for the job due to his race. *Id.* Additionally, Mr.
6 Harden called Mr. Charmley and said that he didn't want "that nigger running
7 shit." *Id.* Mr. Charmley informed Mr. Butler about this conversation. *Id.*
8 According to Mr. Butler, learning that Mr. Harden did not want him to be a
9 supervisor because of his race motivated him to accept the Site Supervisor
10 position. *Id.*

11 When Mr. Butler began performing his job as Site Supervisor in November
12 of 2016, Mr. Harden continued to use racial slurs, including "coon" and "nigger."
13 *Id.* at 5. In September 2017, Mr. Butler emailed Mr. Harden's supervisor about the
14 comments, but Mr. Harden's supervisor never responded. *Id.*

15 On or about October 1, 2017, after learning of Mr. Butler's complaint to his
16 supervisor, Mr. Harden called Mr. Butler at approximately 12:15 a.m. *Id.* at 5.
17 During the call, Mr. Harden asked, "What the fuck is your problem, nigger?" *Id.*
18 Mr. Harden referred to Mr. Butler as "coon," "nigger," "boy," and "spook" during
19 the conversation. *Id.* Again, Mr. Butler reported this behavior to Mr. Harden's
20 supervisor via email. *Id.* at 6. Later, when Mr. Butler attempted to follow up in a
21 telephone conversation with Mr. Harden's supervisor, the supervisor stated that he

1 had not received Mr. Butler's email complaint, and he ended the call before Mr.
2 Butler could explain his complaint. *Id.* Although Mr. Harden's supervisor stated
3 he would call Mr. Butler back, he never did. *Id.*

4 In February of 2018, Mr. Harden called Mr. Butler to discuss G4S's contract
5 with McCain. *Id.* at 7. McCain had indicated that it was going to terminate its
6 contract with G4S, and Mr. Harden asked Mr. Butler to save the contract if he
7 could. *Id.* Mr. Butler did not save the contract, and told Mr. Harden that he would
8 be interested in accepting a job at a different G4S location. *Id.* When it became
9 clear that the contract would end, on or around March 2, 2018, Mr. Harden
10 terminated Mr. Butler, stating, "I trusted you. I thought you were going to fix this.
11 I gave you one job." *Id.* Mr. Butler alleges that Mr. Harden blamed him for losing
12 the contract with McCain. *Id.* When Mr. Harden terminated Mr. Butler, he used
13 the words "coon," "jiggaboo," and "boy," and called Mr. Butler "worthless." *Id.*

14 After he had been terminated from his position with G4S, Mr. Butler applied
15 for and obtained a position with Securitas, the company that took over the security
16 contract with McCain. *Id.* at 7–8. In his new position at Securitas, Mr. Butler
17 makes a lower wage than the wage he earned at G4S. *Id.* at 8. Additionally, Mr.
18 Butler asserts that G4S never paid him for approximately 100 hours of overtime,
19 and that Mr. Harden told him that the unpaid overtime was "non-billable
20 overtime." *Id.*

1 Mr. Butler alleges that he fully exhausted his administrative remedies
2 through the EEOC before filing this action. *Id.* He asserts that Defendant G4S
3 discriminated against him on the basis of his race in violation of Title VII and the
4 Washington Law Against Discrimination (WLAD). *Id.* at 8–9. He has brought
5 claims under both statutes for disparate treatment, hostile work environment, and
6 retaliation. Mr. Butler also asserts a claim of unlawful wage withholding under
7 RCW 49.52.050, and a claim of wrongful discharge in violation of public policy
8 under Washington State law. *Id.* at 9.

9 In defense, G4S filed a Motion to Dismiss for failure to state a claim. *See*
10 ECF No. 12. While G4S has labeled its Motion as a “partial” Rule 12(b)(6)
11 motion, it is unclear which claims the company asks the Court to dismiss. In its
12 Motion, G4S argues that the Complaint, in its entirety, should be dismissed
13 because it is a “shotgun pleading.” *Id.* at 5. Therefore, the Court will address the
14 Motion as a motion to dismiss the entire Complaint.

15 **LEGAL STANDARD**

16 A complaint must contain “a short and plain statement of the claim showing
17 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). In reviewing the
18 sufficiency of a complaint, a court accepts all well-pleaded allegations as true and
19 construes those allegations in the light most favorable to the non-moving party.
20 *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (citing
21

1 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031-32 (9th Cir.
2 2008)).

3 “To survive a motion to dismiss, a complaint must contain sufficient factual
4 matter, accepted as true, to ‘state a claim of relief that is plausible on its face.’”
5 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v.*
6 *Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the
7 plaintiff pleads factual content that allows the court to draw the reasonable
8 inference that the defendant is liable for the misconduct alleged.” *Id.* (citing
9 *Twombly*, 550 U.S. at 556). However, “[r]ule 8(a) ‘does not impose a probability
10 requirement at the pleading stage; it simply calls for enough fact to raise a
11 reasonable expectation that discovery will reveal evidence’ to support the
12 allegations.” *Starr v. Baca*, 652 F.3d 1202, 1214 (9th Cir. 2011) (quoting
13 *Twombly*, 550 U.S. at 556).

14 **DISCUSSION**

15 **I. Affirmative Defenses**

16 G4S moves to dismiss several of Mr. Butler’s claims by arguing that its
17 affirmative defenses preclude Mr. Butler from properly stating them. *See* ECF No.
18 12 at 6–8. A district court can consider affirmative defenses on a motion to
19 dismiss. *Weisbuch v. Cty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir. 1997).
20 “Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper
21 only if the defendant shows some obvious bar to securing relief on the face of the

1 complaint.” *ASARCO, LLC v. Union Pacific R. Co.*, 765 F.3d 999, 1004 (9th Cir.
2 2014). For instance, while a district court may grant a Rule 12(b)(6) motion when
3 the plaintiff’s claim is barred by a statute of limitations, it may only do so when
4 “the running of the statute is apparent on the face of the complaint.” *Von Saher v.*
5 *Norton Simon Museum of Art*, 592 F.3d 954, 969 (9th Cir. 2010) (quoting *Huynh v.*
6 *Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006)). The court may only
7 dismiss a complaint as time-barred if “it appears beyond doubt that the plaintiff can
8 prove no set of facts that would establish the timeliness of the claim.” *Id.* (quoting
9 *Supermail Cargo, Inc., v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995)).

10 **A. Statute of Limitations**

11 G4S has moved to dismiss the Title VII claims against it, arguing that Mr.
12 Butler did not file a charge of discrimination with the EEOC within 300 days of the
13 alleged unlawful activity. “The ‘failure to file an EEOC charge within the
14 prescribed 300-day period . . . is treated as a violation of a statute of limitations . . .
15 .’” *Fox v. Kitsap Cnty.*, No. Co6-5698RBL, 2009 WL 426315, at *6 (W.D. Wash.
16 Feb 20, 2009) (quoting *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1176 (9th Cir.
17 2000)). Therefore, the company argues that the Title VII claims are time-barred
18 and subject to dismissal.

19 In response to this argument, Mr. Butler has submitted the relevant EEOC
20 Charge of Discrimination and the EEOC Notice of Charge of Discrimination. ECF
21 No. 23-2 at 9, 18. In a motion to dismiss for failure to state a claim under Rule

1 12(b)(6), the Court generally may not consider documents and exhibits outside the
2 pleadings. *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001). Usually, when a
3 district court chooses to consider extrinsic evidence on a motion to dismiss, it is
4 converted to a motion for summary judgment, and additional procedures attach.
5 *See id.* However, there are two exceptions to this rule. *Id.* “First, a court may
6 consider ‘material which is properly submitted as part of the complaint’ on a
7 motion to dismiss without converting the motion to dismiss into a motion for
8 summary judgment.” *Id.* (quoting *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir.
9 1994), *abrogated on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d
10 1119 (9th Cir. 2002)). If the documents only are described in the complaint, rather
11 than attached to the complaint, then “they may be considered if [their] ‘authenticity
12 . . . is not contested’ and ‘the plaintiff’s complaint necessarily relies’ on them.” *Id.*
13 (quoting *Parrino v. FHP, Inc.*, 146 F.3d 699, 705–06 (9th Cir. 1998)). Secondly, a
14 court may consider any documents of which it may take judicial notice pursuant to
15 Federal Rule of Evidence 201 when deciding a Rule 12(b)(6) motion to dismiss.

16 EEOC charge and notice forms are public records, of which this Court may
17 take judicial notice. Additionally, these forms generally are considered integral to
18 the complaint in Title VII actions. *See e.g., Reed v. Md. Dept. of Human*
19 *Resources*, No. ELH–12–0472, 2013 WL 489985, at *5 (Feb. 7, 2013 D. Md.)
20 (citing *Holowecki v. Fed. Express Corp.*, 440 F.3d 558, 565 (2d Cir. 2006)).
21

1 Therefore, the Court considers these extrinsic documents, submitted in conjunction
2 with Mr. Butler's Response to G4S's Motion to Dismiss.

3 Mr. Butler alleges that the adverse employment action taken against him, his
4 termination, was taken on or about March 2, 2018. ECF No. 1 at 7. To comply
5 with the 300-day limit, Mr. Butler would have needed to file his complaint with the
6 EEOC by December 27, 2018. Mr. Butler signed an EEOC charge form on
7 December 3, 2018. ECF No. 23-2 at 9. On December 13, 2018, an EEOC official
8 signed a Notice of EEOC Charge, indicating that she had received Mr. Butler's
9 complaint. *Id.* at 18. It appears that Mr. Butler filed another EEOC charge on
10 February 5, 2019, also relating to the alleged discrimination he suffered at G4S.
11 *See* ECF No. 12-6. G4S relies on this February 2019 form to argue that Mr.
12 Butler's claim is time-barred. However, because Mr. Butler's first form was
13 signed before the 300-day deadline, and because the EEOC provided notice of
14 receipt before the 300-day deadline, the Court will not dismiss Mr. Butler's
15 Complaint under Rule 12(b)(6) as time barred.

16 **B. *Ellerth* Affirmative Defense**

17 G4S also argues in its motion to dismiss that its affirmative *Ellerth* defense
18 precludes Mr. Butler from stating a claim. An employer-defendant may raise an
19 *Ellerth* affirmative defense to avoid liability for workplace discrimination claims.
20 This affirmative defense requires the employer to show, "(1) it exercised
21 reasonable care to prevent and correct promptly any [] harassing behavior, and (2)

1 that the employee unreasonably failed to take advantage of preventative or
2 corrective opportunities provided by the employer.” *Burrell v. Star Nursery, Inc.*,
3 170 F.3d 951, 955 (9th Cir. 1999). To prove that Mr. Butler unreasonably failed to
4 take advantage of its anti-discrimination policies, G4S attached exhibits, including
5 witness declarations and its employee handbook. ECF No. 12 at 9–13; *see* ECF
6 Nos. 12-1–12-3, 12-7.

7 The elements of an *Ellerth* affirmative defense are not obvious from the face
8 of Mr. Butler’s Complaint. Additionally, the witness declarations and employee
9 handbook that G4S supplied are not properly considered on a 12(b)(6) motion, as
10 they are not subject to judicial notice, and they were not referenced in the
11 Complaint. Therefore, Mr. Butler’s discrimination claims cannot be dismissed on
12 the basis of this affirmative defense. The *Ellerth* defense is better argued at trial or
13 on a motion for summary judgment.

14 **II. Mr. Butler’s Claims**

15 **A. Disparate Treatment**

16 Mr. Butler has alleged disparate treatment under Title VII and the WLAD.
17 A claim for disparate treatment is “the most easily understood type of
18 discrimination.” *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988)
19 (quoting *Int’l Broth. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).
20 To establish a Title VII disparate treatment claim, the plaintiff must plead and
21 prove that he was treated differently on the basis of his race, color, religion, sex, or

1 national origin. *See* 42 U.S.C. § 2000e-2; *Watson*, 487 U.S. at 985. Specifically,
2 he must show that: “(1) he belongs to a protected class; (2) he was qualified for the
3 position; (3) he was subject to an adverse employment action; and (4) similarly
4 situated individuals outside his protected class were treated more favorably.”
5 *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1123 (9th Cir. 2000). Whether
6 these elements are met is best decided by a factfinder on a full record. *Id.* Under
7 the WLAD, the elements for establishing a disparate treatment claim are nearly
8 identical. *See Billings v. Town of Steilacoom*, 408 P.3d 1123, 1135–36 (Wash. Ct.
9 App. 2017) (citing *Johnson v. Dep’t of Soc. & Health Servs.*, 907 P.2d 1223
10 (1996)).

11 The first element that Mr. Butler must satisfy is that he is a member of a
12 protected class. Mr. Butler satisfies this element by asserting that he is an African
13 American man. ECF No. 1 at 2. Next, Mr. Butler must allege facts that illustrate
14 he was qualified for the position. Mr. Butler satisfies this requirement by asserting
15 that he was hired and eventually promoted by G4S. *Id.* at 2, 4.

16 Third, Mr. Butler must prove that he was subject to an adverse employment
17 action. G4S argues that Mr. Butler has not alleged facts to support this element, as
18 he was promoted by G4S in his time there. Additionally, G4S claims that Mr.
19 Butler was not fired, but that he voluntarily left G4S once G4S’s contract with
20 McCain ended. *See* ECF No. 12 at 2. However, this factual argument contradicts
21 the Complaint. Mr. Butler alleges in his Complaint that he was terminated by Mr.

1 Harden. ECF No. 1 at 7. The Court must take all of the factual allegations by the
2 nonmoving party in the Complaint as true when deciding the instant motion, and
3 therefore rejects G4S's argument that it took no adverse action against Mr. Butler
4 at this stage.

5 Finally, Mr. Butler must allege facts to show that other, non-protected
6 employees were treated differently. In his Complaint, Mr. Butler fails to allege
7 any facts related to the termination of other employees. He does not state whether
8 non-protected employees kept their jobs. However, for reasons explained *supra*, it
9 is proper for the Court to consider the EEOC charges filed by Mr. Butler when
10 deciding G4S's Motion to Dismiss. In the EEOC charge signed February 5, 2019,
11 Mr. Butler states, "To my knowledge, I was the only employee terminated before
12 the conclusion of our March 5, 2018 contract and the only employee prohibited
13 from relocation to a new site or prohibited from being rehired." ECF No. 12-6.
14 Accepting all of Mr. Butler's allegations as true and drawing all reasonable
15 inferences in his favor, Mr. Butler has stated a claim for disparate treatment under
16 Title VII and the WLAD.

17 **B. Hostile Work Environment**

18 Mr. Butler also has alleged a hostile work environment claim under Title VII
19 and the WLAD. Under Title VII, the plaintiff establishes a hostile work
20 environment based on race when he shows that he was subject to verbal or physical
21 conduct of a racial nature, the conduct was unwelcome, and the conduct was

1 “sufficiently severe or pervasive to alter the conditions of the plaintiff’s
2 employment and create an abusive work environment.” *Vasquez v. Cty. of L.A.*,
3 349 F.3d 634, 342–43 (9th Cir. 2003) (using Title VII sexual harassment cases to
4 help define “severe and pervasive” conduct in a race discrimination hostile work
5 environment case); *see also Fuller v. Idaho Dept. of Corrections*, 865 F.3d 1154,
6 1161 (9th Cir. 2017) (quoting *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th
7 Cir. 1995)) (discussing hostile work environment based on sex in violation of Title
8 VII). To decide whether conduct is severe or pervasive, courts must look at “all
9 the circumstances, including the frequency of the discriminatory conduct; its
10 severity; whether it is physically threatening or humiliating, or a mere offensive
11 utterance; and whether it unreasonably interferes with an employee’s work
12 performance.” *Vasquez*, 349 F.3d at 642.

13 To survive a Rule 12(b)(6) motion, Mr. Butler first must allege facts to show
14 that he was subject to verbal or physical conduct of a racial nature. In his
15 Complaint, Mr. Butler asserts that, on many specific occasions, Mr. Harden used
16 racial slurs to address him, which included “coon,” “nigger,” “jigaboo,” and
17 “spook.” Additionally, Mr. Harden allegedly attempted to persuade Mr. Butler’s
18 supervisor not to hire Mr. Butler for a supervisor position because of his race. ECF
19 No. 1 at 4. Mr. Harden also allegedly called Mr. Butler in the middle of the night
20 to harass Mr. Butler, again using racial slurs. *Id.* at 5. Therefore, Mr. Butler has
21 alleged sufficient facts to establish verbal conduct of a racial nature.

1 Secondly, Mr. Butler's Complaint must contain allegations showing that the
2 harassment was unwelcome. Mr. Butler states that he consistently reported Mr.
3 Harden's conduct, specifically alleging several instances in which he either told
4 Mr. Charmley or Mr. Harden's supervisor about Mr. Harden's use of racial slurs.
5 Additionally, Mr. Butler claims that he asked Mr. Harden not to use racial slurs
6 when speaking to him. *See* ECF No. 1 at 3. Therefore, Mr. Butler has alleged
7 sufficient facts to demonstrate that the comments were unwelcome.

8 Third, Mr. Butler's Complaint must contain allegations that show the
9 conduct complained of was "sufficiently severe or pervasive to alter the conditions
10 of [his] employment and create an abusive work environment." *Vasquez*, 349 F.3d
11 at 342–43. Mr. Butler's Complaint contains allegations of verbal harassment from
12 2016 to the day he was fired in 2018. Some of the racial comments complained of
13 included threatening language, like, "What the fuck is your problem, nigger?" and,
14 "Fuck man, you nigger." ECF No. 1. at 6, 3. The intense nature of these
15 comments supports a finding that the comments were "severe" for the purposes of
16 Title VII. Additionally, Mr. Harden's late-night telephone call, in which he
17 confronted Mr. Butler for reporting his previous racial slurs, is evidence of severe
18 behavior, violative of Title VII. Mr. Butler explains that the call made him
19 nervous, and that he was "concerned" about the call's "middle of the night nature."
20 *See* ECF No. 1 at 5. Finally, Mr. Butler claims that Mr. Harden attempted to
21 persuade management not to hire Mr. Butler for an open supervisor position

1 because of his race. *Id.* at 4. While Mr. Butler eventually received the supervisor
2 role, this allegation supports a finding that Mr. Harden's conduct was severe in
3 nature. Therefore, the Court concludes that Mr. Butler has stated sufficient facts at
4 this stage to support a claim for hostile work environment based on race under
5 Title VII.

6 The elements for a hostile work environment under the WLAD are closely
7 related to Title VII's elements. However, under the WLAD, a plaintiff also must
8 plead and prove that the harassment is imputed to the employer. *See Washington*
9 *v. Boeing Co.*, 19 P.3d 1041, 1048 (Wash. 2000). The discriminatory conduct of a
10 supervisor or fellow employee may be imputed to the employer if the employer
11 "(a) authorized, knew, or should have known of the harassment and (b) failed to
12 take reasonably prompt and adequate corrective action." *Glasgow v. Georgia-*
13 *Pacific Corp.*, 693 P.2d 708, 712 (Wash. 1985).

14 Mr. Butler alleges that he reported Mr. Harden's racist comments on
15 numerous occasions. *See, e.g.*, ECF No. 1 at 5. He also claims that a fellow
16 employee reported Mr. Harden's use of racial slurs. *Id.* at 6. These factual
17 allegations, when taken in the light most favorable to Mr. Butler, demonstrate that
18 G4S either knew or should have known of Mr. Harden's racially charged
19 comments. According to Mr. Butler, the company did not take prompt or adequate
20 action against Mr. Harden. *See id.* at 20, 22. Therefore, Mr. Butler has stated a
21

1 claim for which relief can be granted for hostile work environment under the
2 WLAD.

3 **C. Retaliation**

4 Mr. Butler alleges that Defendants retaliated against him in violation of Title
5 VII and the WLAD. Title VII forbids retaliating against an individual for engaging
6 activity that is protected by Title VII. 42 § U.S.C. 2000e–3(a). To succeed on a
7 claim of retaliation, the plaintiff must prove that he engaged in a statutorily
8 protected activity, that the defendant took an adverse employment action against
9 him, and that his protected activity was the but-for cause of the adverse action
10 taken against him. *See Ray v. Henderson*, 217 F.3d 1234,1240 (9th Cir. 2000);
11 *Univ. of Tex. SW. Med. Cent. v. Nassar*, 570 U.S. 338, 352 (2013) (establishing
12 that but-for causation is applicable to Title VII retaliation claims).

13 The WLAD also prohibits retaliation against employees for protected
14 activity and requires a similar showing from the plaintiff to establish a prima facie
15 case. *See* RCW 49.60.210(1); *Crownover v. State ex rel. Dept. of Transp.*, 265
16 P.3d 971, 980 (Wash. Ct. App. 2011). To state a claim of retaliation under the
17 WLAD, the plaintiff must plead that (1) he engaged in protected activity, (2) the
18 employer took adverse employment action against him, and (3) “there is a causal
19 link between the protected activity and the adverse action.” *See Crownover*, 265
20 P.3d at 980.

1 To state a claim for retaliation under both Title VII and the WLAD, Mr.
2 Butler must first allege that he engaged in protected activity. Mr. Butler engaged
3 in protected activity when he reported discriminatory statements to his employer.
4 Next, Mr. Butler must assert that G4S took an adverse action against him. Mr.
5 Butler claims that G4S terminated his employment contract, which constitutes an
6 adverse action.

7 Finally, Mr. Butler must allege facts that illustrate the adverse action was
8 taken because of his protected activity, reporting Mr. Harden. According to Mr.
9 Butler's Complaint, on October 15, 2017, Mr. Harden stated he would find a way
10 to fire Mr. Butler if Mr. Butler reported him for the late-night telephone call. ECF
11 No. 1 at 6. Mr. Butler reported Mr. Harden for the call, and continually checked in
12 with Mr. Harden's supervisor to see if anything would be done about his
13 complaint. *See id.* Mr. Harden fired Mr. Butler on March 2, 2018, again using
14 racial slurs when addressing Mr. Butler. *Id.* at 7. According to Mr. Butler's
15 February 2019 EEOC charge, Mr. Harden did not fire anybody except Mr. Butler
16 when the McCain contract ended. ECF No. 12-6 at 1. Mr. Butler allegedly was
17 the only employee not allowed to relocate to another G4S worksite. *See id.*; ECF
18 No. 1 at 7.

19 Taken in the light most favorable to Mr. Butler, the facts alleged
20 demonstrate that Mr. Harden terminated Mr. Butler for reporting his slurs and
21

1 racially discriminatory behavior. Therefore, Mr. Butler’s allegations are sufficient
2 to state a claim for retaliation under Title VII and the WLAD.

3 **D. Wrongful Termination in Violation of Public Policy**

4 “The tort for wrongful discharge in violation of public policy is a narrow
5 exception to the at-will doctrine.” *Peiffer v. Pro-Cut Concrete Cutting and*
6 *Breaking Inc.*, 431 P.3d 1018, 1031 (Wash. Ct. App. 2018) (quoting *Becker v.*
7 *Cnty. Health Sys., Inc.*, 359 P.3d 746 (Wash. 2015)). The purpose of the tort is to
8 prevent employers from subverting important mandates of public policy through
9 the at-will doctrine. *Id.* Given the narrow construction of this tort, the Washington
10 State Supreme Court has explained that there are four specific scenarios in which
11 the tort is applicable. *Becker*, 359 P.3d at 749. “When the plaintiff’s case does not
12 fit neatly within one of these scenarios, a more refined analysis may be necessary .
13 . . .” *Id.* The four scenarios identified by the State Supreme Court are:

14 (1) where employees are fired for refusing to commit an illegal act; (2)
15 where employees are fired for performing a public duty or obligation;
16 (2) where employees are fired for exercising a legal right or privilege,
17 such as filing workers’ compensation claims; and (4) where employees
18 are fired in retaliation for reporting employer misconduct, i.e.,
19 whistleblowing.

20 *Id.*

21 As this Court explained in its discussion of Mr. Butler’s retaliation claim,
Mr. Butler has properly alleged that Mr. Harden retaliated against him for
reporting race discrimination. Retaliation for reporting employer misconduct is

1 one of the few scenarios in which Washington courts will recognize a claim for
2 wrongful termination in violation of public policy. Therefore, Mr. Butler has
3 stated a plausible claim for relief for wrongful termination in violation of public
4 policy.

5 **E. Wrongful Withholding of Wages**

6 Mr. Butler claims that G4S's actions constitute wrongful withholding of
7 wages, in violation of Washington law. *See* RCW 49.52.050; RCW 49.52.070. An
8 employer is liable for wage withholding when they "[w]ilfully and with intent to
9 deprive the employee of any part of his or her wages' pay[] the employee less than
10 the wage to which the employee is entitled." *Jumamil v. Lakeside Casino, LLC*,
11 319 P.3d 868, 877 (Wash. Ct. App. 2014) (quoting RCW 49.52.050(1)–(2)). For
12 an employer to be civilly liable for wage withholding, the employer must have
13 knowledge of any wage withholding policies and fail to correct any improper
14 withholding. *Id.*

15 Mr. Butler's complaint only contains two allegations related to his wage
16 withholding claim. His first allegation deals with the overtime hours he worked
17 while at G4S: "From approximately June 2016 through June 2017, Butler
18 frequently worked 60 or more hours per week for G4S at McCain" ECF No.
19 1 at 3. His second allegation states that he "was not paid for approximately 100
20 hours of overtime, which Harden told him he was not owed because it was 'non-
21 billable overtime' or words to that effect." *Id.* at 8. Mr. Butler does not state that

1 the alleged wage withholding was caused by company policies, nor does he state
2 facts to support an argument that G4S knew of the unlawful withholding. Without
3 more, Mr. Butler does not state a viable claim for wage withholding, and that claim
4 is dismissed without prejudice.

5 **III. Motion to Strike**

6 In his Response to G4S's Motion to Dismiss, Mr. Butler asks the Court to
7 strike portions of G4S's Motion, as well as exhibits submitted in conjunction with
8 the Motion. *See* ECF No. 23 at 15. Pursuant to Federal Rule of Civil Procedure
9 12(f), "The Court may strike from a pleading an insufficient defense or any
10 redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).
11 The purpose of the Rule is to "avoid the expenditure of time and money that must
12 arise from litigating spurious issues by dispensing with those issues prior to trial."
13 *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). Mr.
14 Butler has asked the Court to strike exhibits and statements within G4S's Motion
15 to Dismiss, rather than portions of a pleading.

16 It is not apparent that Rule 12(f) applies to statements made within a motion,
17 or exhibits attached to a motion. *See Colon v. Blades*, 268 F.R.D. 143, 146 (D. PR
18 2010). Such materials are not "pleadings" as defined by the Federal Rules of Civil
19 Procedure. *See id.*; Fed. R. Civ. P. 7(a). However, Rule 12(d) states, "If, on a
20 motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to
21 and not excluded by the court, the motion must be treated as one for summary

1 judgment under Rule 54.” Fed. R. Civ. P. 12(d). The Court has discretion to
2 exclude documents submitted in conjunction with a motion to dismiss so as not to
3 convert the motion to a motion for summary judgment. *See Yakima Valley*
4 *Memorial Hosp. v. Wash. State Dept. of Health*, 654 F.3d 919, 925 n.6 (citing
5 *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1207 (9th Cir.
6 2007)); *Holmberg v. Vail*, No. C 11–5449 BHS/KLS, 2012 WL 380043, at *6 (Jan.
7 3, 2012 W.D. Wash.) (“[I]t is up to the Court to decide whether to consider or
8 reject such material.”). “ The Court finds that the declaration of Chris Phillips,
9 ECF No. 12-1, G4S’s Employee Handbook, ECF No. 12-2, G4S’s Ethics Code,
10 ECF No. 12-3, “Consolidated Answer Sheet,” ECF No. 12-4, “Voluntary
11 Resignation,” ECF No. 12-5, and the Affidavit of Frank Plick, ECF No. 12-7 are
12 outside the pleadings. On that basis, the Court excludes them and declines to
13 convert G4S’s motion to dismiss into a summary judgment motion. *See* Fed. R.
14 Civ. P. 12(d). However, for reasons this Court already has stated, Mr. Butler’s
15 February EEOC charge, ECF No. 12-6, is within the pleadings, and under Rule
16 12(d) the Court may consider it on G4S’s Motion to Dismiss without converting
17 the motion to dismiss into a motion for summary judgment.

18 Accordingly, **IT IS HEREBY ORDERED:**

19 1. Defendant’s Motion to Dismiss, **ECF No. 12**, is **GRANTED IN**
20 **PART AND DENIED IN PART**. Plaintiff’s wage withholding claim, only,
21

1 is **DISMISSED WITHOUT PREJUDICE**. All other claims remain
2 pending.

3 2. Plaintiff's Motion to Strike is **GRANTED IN PART AND DENIED**
4 **IN PART**. Exhibits at ECF Nos. 12-1, 12-2, 12-3, 12-4, 12-5, and 12-7 are
5 **STRICKEN** from the record.

6 **IT IS SO ORDERED**. The District Court Clerk is directed to enter this
7 Order and provide copies to counsel.

8 **DATED** November 14, 2019.

9
10 *s/ Rosanna Malouf Peterson*
ROSANNA MALOUF PETERSON
11 United States District Judge
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